IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No. 1376 of 1990

For Approval and Signature:

HON'BLE MISS JUSTICE R.M. DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

JAMNADAS HIMMATLAL SHAH [DECEASED] THRO'HIS HEIRS

Versus

ALKESHPRASAD MADHUSUDAN

Appearance:

1. Civil Revision Application No. 1376 of 1990

MR MC SHAH for Petitioners

MR SS BELSARE for Respondent

CORAM : HON'BLE MISS JUSTICE R.M.DOSHIT

Date of decision: 29/04/2005

ORAL JUDGEMENT

Feeling aggrieved by the judgment and order dated

1st October, 1990 passed by the learned Extra Assistant Judge, Bharuch in Regular Civil Appeal No. 65 of 1986, the respondents, defendants in Regular Civil Suit No. 253 of 1986, have preferred the present Revision Application under Section 29 (2) of the Bombay Rents, Hotel & Lodging House Rates Control Act, 1947 [hereinafter referred to as, "the Rent Act"].

The respondent-plaintiff is the owner of the suit shop bearing Ward No.A-1405, Survey No.186-188/1 situated at Bharuch. The suit shop was leased to the defendant no.1 for a monthly rent of Rs.75/=. By compromise dated 10th April, 1973, arrived at in the Standard Rent Application No.10 of 1973, the standard rent of the suit premises was agreed to be Rs.75/= exclusive of permitted increases.

The plaintiff instituted Regular Civil Suit No. 253 of 1983 in the Court of learned Civil Judge [JD], Bharuch for recovery of possession of the suit shop on the grounds that the defendant no.1 had sublet the suit shop to the defendants no. 2 & 3 and the defendants had changed the user of the suit shop. The defendants contested the suit by filing written statement Exh.16. It was denied that the suit shop was sublet to the defendants no. 2 & 3 or that there was a change of user. It was stated that the suit shop was taken on rent for running the business ie. for commercial purpose and was continued to be used for commercial purpose. It was stated that the defendant no.1 was running a business in readymade garments in the suit shop. As the said business ran into losses, the defendant no.1 took defendants no. 2 & 3 as the partners. The defendants started partnership in the name of K.J Brothers under the partnership deed dated 3rd March, 1983 [Exh.56] and were dealing in suitcases. Under the dissolution deed dated 1st September, 1983 [Exh.57], the said partnership firm was dissolved w.e.f 1st July, 1983.

The learned Civil Judge, by the judgment and order dated 20th March, 1986 dismissed the suit. The learned Civil Judge held that the plaintiff had failed to prove that the suit shop was leased for the purpose of business of readymade garments alone and that the defendant no.1 had parted with the possession of the suit shop in favour of the defendants no. 2 & 3.

Feeling aggrieved, the plaintiff preferred above referred Regular Civil Appeal No. 65 of 1986 in the Court of learned District Judge, Bharuch. The appeal was heard by the learned Extra Assistant Judge. The lower

appellate court was pleased to allow the appeal. The lower appellate Court was pleased to hold that the defendant no. 1 indeed had sublet the suit shop to the defendants no. 2 & 3. The lower appellate court also relied upon the evidence of the defendant no.2, one of the partners in the aforesaid partnership firm. The defendant no.2 had stated that the partnership firm did not pay rent to the defendant no.1 and that the share in the partnership firm assigned to him included the rent. The lower appellate court has also considered the discrepancy in the partnership deed Exh.56 and the photocopy of the partnership deed Exh.65. It appears that the photo copy of the partnership deed produced at Mark 47/1 was not the photocopy of the original partnership deed Exh.56. There is discrepancy in as much as the order of signature of the partners is changed. The original partnership deed contains signature of the attesting witnesses whereas the photocopy does not bear the signature of the attesting witnesses. The lower appellate court, therefore, has held that the partnership was sham and bogus to camouflage the consideration for sub-tenancy paid to the defendant no.1. Therefore, the present Revision Application.

Mr. Shah has submitted that there is discrepancy in so far as signatures of the partners and the signature of attesting witnesses are concerned. But that shall not affect the case of the defendant no.1. He has submitted that as far as the contents are concerned, they are verbatim the same. The covenants of the partnership do not suggest that the defendant no.1 had parted with the possession of the suit shop in favour of the defendants no. 2 & 3 to the exclusion of himself. In absence of such a proof, the sub-tenancy cannot be said to be proved.

Mr. Belsare has heavily relied upon the aforesaid discrepancy in documents Exhs. 56 & 65. He has also relied upon the oral evidence of defendant no. 2 to the effect that the defendant no.1 had not to do anything in the partnership business and that the share of the defendant no. 1 included the rent of the suit shop. He has also relied upon the judgement of the Hon'ble Supreme Court in the matter of Mahendra Saree Emporium [II] vs. G.V Srinivasa Murthy [(2005) SCC 481]. He has submitted that unless the defendant no.1 was actively associated in the partnership firm, it cannot be said to be a genuine partnership. He has also relied upon the judgment of the Hon'ble Supreme Court in the matter of Patel Naranbhai Marghabhai & Ors. vs. Deceased Dhulabhai Galbhai & Ors. [AIR 1992 SC 2009] and

has submitted that unless the best available evidence is produced by the defendants an adverse inference should be drawn against the defendants. He has submitted that defendants could have produced the accounts of the partnership firm to establish that it was a genuine partnership and that it was acted upon. In absence of such best evidence, inference of sub-tenancy should be drawn.

I am unable to agree with Mr. Belsare. As recorded hereinabove though there is some discrepancy in the documents Exhs. 56 & 65, there is no discrepancy as far as the contents of the said documents are concerned. The covenants of the partnership do not suggest that the defendant no.1 was agreed to be paid a fixed amount irrespective of profit or loss in the business. The defendant no.1 had fifteen per cent share in the profit and loss in the business. It is also not established that the partnership was not acted upon. The said covenants also do not exclude the defendant no.1 from acting as a partner in the partnership firm. Merely because the defendant no.1 may not be an active partner in the partnership firm or that he had not brought any money by way of his contribution to the partnership firm, it cannot be said that the defendant no.1 had parted with the possession of the suit shop to the exclusion of himself. In the above referred judgment in the matter of Mahendra Saree Emporium [Supra] also, the same principle has been reiterated by the Hon'ble Supreme Court. The Hon'ble Judges have reproduced the quote from the earlier judgment in the matter of Parvinder Singh v. Renu Gautam [(2004) 4 SCC 794] with approval which reads as under :-

"If the tenant is actively associated with the partnership business and retains the use and control over the tenancy premises with him, may be alongwith the partners, the tenant may not be said to have parted with possession. However, if the user and control of the tenancy premises has been parted with and deed of partnership has been drawn up as an indirect method of collecting the consideration for creation of sub-tenancy or for providing a cloak or cover to conceal a transaction not permitted by law, the court is not estopped from tearing the veil of partnership and finding out the real nature of transaction entered into between the tenant and the alleged sub-tenant."

In absence of any cogent evidence to establish that the defendant no.1 had parted with the possession of the suit premises to his own exclusion, I am of the opinion that the lower appellate court has erred in holding that the partnership was sham and bogus, created to camouflage unlawful sub-tenancy.

In view of the above discussion, the Revision Application is allowed with cost. The impugned judgment and order dated 1st October,1990 passed by the learned Extra Assistant Judge, Bharuch in Regular Civil Appeal No. 65 of 1986 is quashed and set-aside. The judgment and order dated 20th March, 1986 passed by the learned Joint Civil Judge [JD], Bharuch in Regular Civil Suit No. 253 of 1983 is restored. Rule is made absolute.

{Miss R.M Doshit, J.}

Prakash*